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U.S. Department of Justice

Immigration and Naturalization Service

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [redacted] Office: Vermont Service Center Date: 2 8 FEB 2002

EAC 01 174 54909

IN RE: Petitioner: [redacted]
Beneficiary:

APPLICATION: Petition for Special Immigrant Battered Child Pursuant to Section 204(a)(1)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(1)(B)(iii)

IN BEHALF OF PETITIONER:

[redacted]

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Mexico who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1154(a)(1)(B)(iii), as the battered child of an alien lawfully admitted for permanent residence.

The director determined that the petitioner failed to establish that she is the child of a citizen or lawful permanent resident of the United States because she was over the age of 21 years when the petition was filed. The director, therefore, denied the petition.

On appeal, counsel asserts that the abuse occurred before the petitioner turned 21 years old; therefore, she meets the definition of an abused "child." He further asserts that the petitioner was unable to file prior to turning 21 years old because she and her mother were under threats and the control of her abusive father. Counsel states that the self-petition relates back to the date of filing and approval of the previously filed Form I-130 by the petitioner's abuser; therefore, the I-360 should be considered filed and approved prior to the applicant turning 21 years old. Counsel further states that denying the petitioner, who was a victim of physical, emotional and mental abuse by her father as a child, the right to file a self-petition as an abused child violates the petitioner's U.S. Constitutional right to due process and right to Equal Protection because victims of such abuse are unaware or unable to file their petitions while still "children" since they are under the control of the abuser.

It should be initially noted that the Immigration and Naturalization Service (the Service) cannot pass judgement upon constitutionality of the statute it administers. Counsel's contention, therefore, that a pertinent section of the Crime Bill violates both the Equal Protection and Due Process Clauses of the Constitution is simply advanced in an inappropriate forum. The Service can address questions relating to the constitutionality of its application of the law; however, since all applicants seeking special immigrant status under the battered spouse/child provisions of the Act must qualify on the same basis, as mandated by Congress, no violation of equal protection can be found. Furthermore, the petitioner was not denied "the right to file a self-petition" as claimed by counsel but, rather, the petition was denied based on statutory ineligibility.

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8 C.F.R. 204.2(e)(1) states, in pertinent part, that:

> (i) A child may file a self-petition under section 204(a)(1)(A)(iv) or 204(a)(1)(B)(iii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:
>
> > (A) Is the child of a citizen or lawful permanent resident of the United States;
> >
> > (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;
> >
> > (C) Is residing in the United States;
> >
> > (D) Has resided in the United States with the citizen or lawful permanent resident parent;
> >
> > (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident parent while residing with that parent;
> >
> > (F) Is a person of good moral character; and
> >
> > (G) Is a person whose deportation (removal) would result in extreme hardship to himself or herself.

The petition, Form I-360, shows that the petitioner arrived in the United States on April 10, 1988. However, her current immigration status or how she entered the United States was not shown. On April 30, 2001, a self-petition was filed by the petitioner claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her permanent resident parent while residing with that parent.

8 C.F.R. 204.2(e)(1)(i)(A) requires that the self-petitioner must establish that she is the child of a citizen or lawful permanent resident of the United States. 8 C.F.R. 204.2(e)(1)(ii) provides that the self-petitioning child must be unmarried, less than 21 years of age, and otherwise qualify as the abuser's child under the definition of child contained in section 101(b)(1) of the Act when the petition is filed and when it is approved.

Section 101(b)(1) of the Act defines the term "child" to mean an unmarried person under 21 years of age. The record reflects that

the petitioner was born on April 11, 1979. On April 24, 2001, more than one year after the petitioner turned 21 years of age, she filed this self-petition. The director, therefore, determined that the petitioner did not qualify as the child of a lawful permanent resident because she was over 21 years of age.

While counsel, on appeal, asserts that the petitioner is the beneficiary of an approved I-130 petition filed in her behalf by her abusive father when she was under the age of 21 years, the petitioner, however, filed a self-petition, Form I-360, for benefits under section 204(a)(1)(B)(iii) of the Act. This self-petition is adjudicated accordingly.

The petitioner is statutorily ineligible for the benefit sought pursuant to section 204(a)(1)(B)(iii) of the Act. She has, therefore, failed to overcome the director's finding pursuant to 8 C.F.R. 204.2(e)(1)(i)(A).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.